In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-843

HARVEY J. POWERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of having used the mails to defraud in violation of 18 U.S.C. 1341. He was sentenced to four years' imprisonment. The court of appeals affirmed with one judge dissenting (Pet. App. A).

The sole issue raised in the petition—whether the government is "free to adopt diametrically opposed and mutually exclusive factual positions in separate criminal cases" (Pet. 2)—is not presented on this record. The only issue presented is whether the district court properly sustained objections to specific questions directed to two witnesses, by which petitioner sought to bring the alleged inconsistency to the jury's attention.

The facts are set forth in detail in the opinion below (Pet. App. 1-6). Briefly, petitioner (an attorney) and his client (Guido Fidanzi) negotiated an arrangement on behalf of World Wide Mortgage Company, whereby they were to obtain a $100,000 loan for Bennie Beaird in exchange for a $12,000 finder's fee. Beaird and his partner gave petitioner certified checks for $2,240 as an advance fee, and that was the last Beaird saw of petitioner and Fidanzi. The checks were later given to Donald Blazavier, an employee of World Wide, who testified that he cashed the checks and gave the proceeds to petitioner.

Blazavier's testimony conflicted with his testimony at a prior trial in which Fidanzi had been convicted of income tax evasion. See *United States* v. *Fidanzi*, 411 F. 2d 1361 (C.A. 7), certiorari denied, 396 U.S. 929. He stated then that he had not been able to cash the checks and had returned them to Fidanzi. He testified in this case that conversations with his wife had refreshed his recollection of the second, successful effort to cash the checks. After "searching cross-examination" (Pet. App. 4), defense counsel sought to elicit from Blazavier testimony concerning whether he was aware of the charges against Fidanzi in the prior trial. The district court sustained an objection to the specific question posed, but invited defense counsel to ask other questions (Pet. App. 4). Counsel declined to do so.

Thereafter, petitioner as part of his case, called an Internal Revenue Service agent, from whom he sought to adduce testimony with respect to the agent's investigation of Fidanzi and his determination that the proceeds of the Beaird checks were income chargeable to Fidanzi. The district court sustained objections to several questions along that line.

The court of appeals did not find it necessary to reach the issue raised here by petitioner.[1] It held, first, that in the circumstances of this record "[t]here is no necessary inconsistency between money being handed to one person [petitioner] and liability for not paying tax on that money being chargeable to another person [Fidanzi] who was the ultimate recipient" (Pet. App. 8). A different question might be presented if both petitioner and Fidanzi had been separately charged with income tax evasion, attributing the full income to *each* of them. But in this mail fraud prosecution, it was not necessary to show that petitioner was the ultimate beneficial recipient of the $2,240; it was enough to show that he used the mails as an active participant in the schemes to defraud Beaird.

Second, the court ruled that the particular question addressed to Blazavier was properly excluded because it was both objectionable as to form and immaterial. The witness's prior inconsistency had been fully explored on cross-examination and the district court, while excluding the question asked, did not "chill a proper pursuit of the subject" (Pet. App. 9). Finally, the court held that the questions directed to the IRS agent did not relate to whether the government, as opposed to one of its employees, had taken inconsistent positions at the two trials.

We rely upon the opinion below as showing that these rulings are correct and that further review is not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1973.

[1]The court stated (Pet. App. 6):

> We do not say, because we do not need to reach the question, that the Government's position in a prior criminal trial may never be asserted in some form against the Government in subsequent criminal litigation.